IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CRIMINAL NO. 98-13-1**
	:	
THOMAS KELLY	:	

MEMORANDUM ORDER

Presently before the court is defendant's Omnibus Motion for Discovery.

Defendant requests a pretrial hearing to determine the admissibility of statements by co-conspirators pursuant to Fed. R. Evid. 801(d)(2)(E) and to establish the unavailability of any non-testifying co-conspirators whose out of court statement will be offered.

For the proposition that the government has the burden of proving the unavailability to testify of a co-conspirator whose out of court statement will be offered against the defendant pursuant to Rule 801(d)(2)(E), defendant correctly cites U.S. v. Inadi, 748 F.2d 812, 819 (3d Cir. 1984). Remarkably, however, defendant fails to note that the Confrontation Clause analysis and holding in that case were expressly repudiated by the U.S. Supreme Court. See U.S. v. Inadi, 475 U.S. 387, 400 (1986).

Defendant is correct that there must be some independent corroborating evidence of the existence of a conspiracy and the connection of the declarant, his statement and the defendant thereto ultimately to sustain the admissibility of

a co-conspirator's statement under Rule 801(d)(2)(E). In making the Rule 801(d)(2)(E) determination, however, the court may consider the out of court statements themselves. Bourjaily v. U.S., 483 U.S. 171, 181 (1987). Also, statements or admissions by the defendant against whom such out of court declarations are offered may constitute the additional independent evidence required. See, e.g., U.S. v. Castaneda, 16 F.3d 1504, 1509 (9th Cir. 1994); U.S. v. Clay, 16 F.3d 892 895 (8th Cir. 1995); U.S. v. Sutton, 732 F.2d 1483, 1489 (10th Cir. 1984), cert. denied, 469 U.S. 1157 (1985).

A defendant is not entitled to a pretrial hearing to determine the admissibility of statements pursuant to Rule 801(d)(2)(E). U.S. v. West, 58 F.3d 133, 142 (5th Cir. 1995); U.S. v. Blevins, 960 F.2d 1252, 1256 (4th Cir. 1992); U.S. v. Medina, 761 F.2d 12, 17 (1st Cir. 1985); U.S. v. Aguirre-Parra, 763 F. Supp. 1208, 1217 (S.D.N.Y. 1991); U.S. v. Vastola, 670 F. Supp. 1244, 1268 (D.N.J. 1987); U.S. v. Steinmetz, 643 F. Supp. 537, 542 (M.D. Pa. 1986). Such hearings often turn into mini-trials. The court will, however, require the government to submit a pretrial proffer of evidence sufficient to show that it can satisfy the criteria for admissibility under Rule 802(d)(2)(E).

Defendant's suggestion that without a formal pretrial hearing, he "can be tainted with evidence of conspiratorial acts" which he did not commit is unpersuasive. Indeed, defendant may be

convicted for any such criminal acts if they were committed by a co-conspirator in furtherance of the conspiracy and as a foreseeable consequence of the conspiracy. Pinkerton v. U.S., 328 U.S. 640, 646 (1946); U.S. v. Gonzalez, 918 F.2d 1129, 1135-36 (3d Cir. 1990), cert. denied, 499 U.S. 982 (1991).

Defendant also requests an order directing the government to disclose any intention to offer evidence of other crimes or wrongful acts consistent with Fed. R. Evid. 404(b). The Rule itself provides that the prosecution shall give reasonable notice in advance of trial of any such intention "upon request of the accused." There is no suggestion by defendant that he ever made such a request with which the government refused to comply. Rather, he sought and obtained from the court on April 3, 1998 a significant extension of time for filing pretrial motions and then filed the instant motion on April 30, 1998, the last day allowable, apparently without ever having addressed a timely request for any Rule 404(b) evidence to the government. Under such circumstances, the government is justified in treating the instant motion with which it was just served as defendant's first request and cannot be faulted for failing to provide any Rule 404(b) evidence prior thereto.

In this regard, of course, "other acts" evidence does not include evidence of acts performed in furtherance of the conspiracy. Such evidence is "inextricably intertwined" with evidence of the actual crime charged. U.S. v. Torres, 586 F.2d

921, 924 (5th Cir. 1982). It is "part of the very [criminal] act charged." U.S. v. Concepcion, 983 F.2d 369, 392 (2d Cir. 1992).

Defendant finally asks that the court order the government to retain all rough notes and drafts of statements made by investigating agents in this case. This is something which in the court's experience the government routinely does and the court assumes that it will not resist being ordered to do so in the instant case.

ACCORDINGLY, this day of May, 1998, **IT IS HEREBY ORDERED** that defendant's Omnibus Motion for Discovery is **GRANTED** in part in that the government shall forthwith provide defendant with notice of any intention to present evidence of other crimes or wrongs under Fed. R. Evid. 404(b) and shall retain any existing rough notes or drafts of statements prepared by investigating agents in this case, and such Motion is otherwise **DENIED**. **IT IS FURTHER ORDERED** that the government shall submit to the court and serve on defendant by Noon on Friday, May 8, 1998 a proffer of the evidence on which it will rely to satisfy the independent corroboration requirement of Fed. R. Evid. 802(d)(2)(E).

BY THE COURT:

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JAY C. WALDMAN, J.